Federal Court  Cour fédérale

Date: 20130521

Docket: T-1734-11

Citation: 2013 FC 520

Ottawa, Ontario, May 21, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

BRONWYN CRUDEN and THE CANADIAN HUMAN RIGHTS COMMISSION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Cruden, an employee of the Canadian International Development Agency [CIDA], wished to be posted to Afghanistan. CIDA refused to post her to Afghanistan partly on the basis of a medical assessment done by Health Canada [HC] that determined that because of her diabetes, she was medically unfit for that positing. Ms. Cruden filed complaints of discrimination against CIDA and HC with the Canadian Human Rights Commission.

[2] In this application, CIDA and HC are asking the Court to quash the decision of the Canadian Human Rights Tribunal [Tribunal] which found that they had discriminated against Ms. Cruden on the basis of disability, contrary to the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*]. The relevant provisions of the *CHRA* are attached to these reasons as Appendix A.

[3] Although the Tribunal found that because of her diabetes it would have caused CIDA undue hardship to accommodate Ms. Cruden in Afghanistan, it upheld her complaints against HC (under paragraph 7(b) of the *CHRA*) and CIDA (under paragraphs 7(b) and 10(a) of the *CHRA*) based on its finding that there were "procedural" shortcomings in the accommodation process.

[4] With respect to CIDA, the central issue in this application is whether, in their employment, employees enjoy – apart from the "substantive" right to be accommodated by their employers up to the point of undue hardship – a separate "procedural" right to accommodation that can be independently breached and attract remedies under the *CHRA* even when their employer cannot accommodate the disability without undue hardship.

[5] In the decision under review, the Tribunal also found that the application of a set of medical assessment guidelines led to, or significantly contributed to HC's negative assessment of Ms. Cruden's medical suitability to be posted to Afghanistan. The Tribunal found these medical assessment guidelines were discriminatory because they did not permit individualized assessments, notwithstanding that Ms. Cruden's assessment under these guidelines was ultimately consistent with the substantive duty to accommodate.

[6] With respect to HC, the central issue in this application is whether Ms. Cruden can be said to have suffered adverse differentiation under paragraph 7(b) of *CHRA* by the application of guidelines HC developed, even though the result of the application of these guidelines to her accords with the decision of the Tribunal that she could not be accommodated in the job she sought.

[7] For the reasons that follow, with the exception of the finding that the Afghanistan Guidelines have the potential to be discriminatory on a forward-looking basis, I find that the Tribunal's decision is unreasonable and must be set aside because having found that Ms. Cruden's disability could not be accommodated without undue hardship, her human rights complaint had to be dismissed. The Tribunal had no residual jurisdiction to make the findings and issue the remedial actions it did.

Background

[8] CIDA manages Canada's international development assistance program. It has a corporate section and a programming section. Ms. Cruden, who has a background in communications, joined CIDA's corporate section in 2007 in the Results and Accountability section of the Afghanistan Task Force. Ms. Cruden wished to become involved in development work in the field, which falls within CIDA's programming section. Given her background and lack of field experience, that transition was problematic. She planned to use her experience and position in the corporate section to obtain a field posting to Afghanistan. Postings to Afghanistan were possible, even without previous experience in the field or background because it was not a sought-after posting due to the extremely difficult and war-like conditions in Afghanistan.

[9] As a result of those conditions, persons posted to Afghanistan by CIDA were given periods of leave during which others replaced them on temporary duty assignments. Ms. Cruden was on such a temporary duty assignment in Kabul, Afghanistan, from August 6, 2007, to September 7, 2007. She received no medical assessment prior to this temporary duty assignment and completed it without incident.

[10] On January 20, 2008, Ms. Cruden commenced a second temporary duty assignment with the Kandahar Provincial Reconstruction Team in Kandahar, Afghanistan. Again, she did so with no prior medical assessment. It was to be a six-week assignment; however, on February 11, 2008, Ms. Cruden had a hypoglycemic incident while sleeping. A co-worker alerted a Canadian Forces medical officer who administered intravenous glucose. Ms. Cruden was given medical assistance at the Kandahar Air Field [KAF], and it was recommended by the doctors there that she be repatriated to Canada. Although Ms. Cruden informed CIDA that she disagreed with the assessment and wished to complete her assignment, CIDA ended her temporary duty assignment and returned her to Canada.

[11] Ms. Cruden had previously expressed an interest in several one-year postings that were to become available in Afghanistan later in 2008. Soon after her return to Canada, to support her desire to be posted, Ms. Cruden obtained a letter from her physician, Dr. Arnout, who wrote that she was "mentally and physically capable of continuing her work in Afghanistan." In order to ascertain Ms. Cruden's fitness to be re-deployed to Afghanistan, CIDA requested that Ms. Cruden be medically assessed by HC.

[12] As a result of Ms. Cruden's medical incident in Afghanistan, her need for medical intervention, and her removal to Canada, Major Robin Thurlow of the Canadian Expeditionary Force Command, on February 26, 2008, expressed his concern that no pre-deployment medical assessments were conducted for deployments to Afghanistan lasting less than one year.

[13] As a result of Ms. Cruden's medical incident in Afghanistan, a HC medical officer wrote a new section for HC's Occupational Health Assessment Guide [OHAG] to address postings to Afghanistan, entitled "Medical Evaluation Guidelines for Posting, Temporary Duty or Travel to Afghanistan (Hardship Post level 5 with Hostility Bonus)" [the Afghanistan Guidelines]. A first draft of the Afghanistan Guidelines was circulated on March 18, 2008. The following statement in the Afghanistan Guidelines under the heading "Absolute medical requirements" played a significant role in these proceedings:

> Employees do not meet the medical requirements for assignment or posting: […] If they have a medical condition that would likely lead to a life-threatening medical emergency if access to prescribed medication and/or other treatment is interrupted for a short period of time.

[14] The same day, HC conducted a pre-deployment medical assessment of Ms. Cruden and five of its physicians unanimously agreed that Ms. Cruden was not fit to be redeployed to Afghanistan. Roughly three weeks later, HC wrote to CIDA with its recommendation that Ms. Cruden not be posted to Afghanistan. Although HC acknowledged in its letter to CIDA that Dr. Arnout submitted information indicating that Ms. Cruden's condition was currently stable, it reasoned that because she was at risk of destabilization due to her condition, she might require sophisticated care or treatment not available at that post.

[15] On April 10, 2008, CIDA informed Ms. Cruden that she had not been selected for the position of Director of Kandahar, one of the deployments for which she had recently applied.

[16] Ms. Cruden had also applied for the position of Manager of Results and Accountability, a position in Canada which required periodic travel to Afghanistan. There was a concern within CIDA about this travel requirement because, following HC's assessment, it would remove Ms. Cruden from the competition for this position.

[17] On April 16, 2008, CIDA informed Ms. Cruden that HC had recommended against her redeployment to Afghanistan. Ms. Cruden sought more information as to the respective roles and responsibilities of CIDA and HC and was informed by HC that while it had responsibility to provide recommendations based on its health assessments, the ultimate decision concerning her deployment to Afghanistan rested with CIDA. Ms. Cruden then asked CIDA to exercise its discretion and allow her to be deployed to Afghanistan. On May 21, 2008, CIDA decided that it would follow HC's recommendation that Ms. Cruden was not medically fit for a deployment to Afghanistan. In order to permit Ms. Cruden to compete for the position of Manager of Results and Accountability, however, the requirement to travel to Afghanistan was removed.

[18] Ms. Cruden then asked CIDA if there had ever been a situation where it did not follow HC's recommendation and also inquired as to whether CIDA would ask HC for an advance fitness assessment for its future overseas postings.

[19] CIDA's response was that it followed HC's assessments in almost all cases because its managers, not being medically trained, were not "in any position to re-evaluate [HC's] determination." It did confirm that it is ultimately CIDA's managers who have the final say on posting assignments, "taking into account both the situation at the post and the medical fitness of the employee." Lastly, CIDA declined to issue advance fitness assessment requests on Ms. Cruden's behalf since the assessments were only valid for six months and would be of little or no use for speculative future postings.

[20] On June 22, 2008, Ms. Cruden emailed CIDA telling it that she had spent the weekend reflecting on its strategy to address her situation "via an accommodation route," and stated:

> I am not a "blonde" – I can clearly see that the accommodation route is the most viable strategy as very few people are able to see it as discrimination. What you have to understand is that I have never allowed myself to accept that I am anything but "normal". That strategy requires me to not only accept publicly that I am "disabled", but that I also require someone else to accommodate me in some way in order for me to be able to function. […]
>
> As a result, I have decided to send this over to the [Public Service Commission] and [Human Rights Commission] in case they are interested in investigating it further and spend my own efforts on finding a new path for myself.

[21] On August 26, 2008, departing from its earlier response on the issue of advance fitness requests, CIDA wrote to Ms. Cruden saying that HC had indicated a willingness to review countries where posting might be possible despite her diabetes.

[22] On September 25, 2008, Ms. Cruden met with a HC medical officer and provided the officer with a list of nineteen countries given to her by CIDA that were expected to have postings available

in the near future. During this meeting, Ms. Cruden also learned from the medical officer that it was possible to request an internal review of her circumstances with HC's Medical Advisory Committee [HC-MAC]. She was later assured by HC that it would respect the decision of the HC-MAC, whatever it might be. Accordingly, Ms. Cruden sought a review by HC-MAC.

[23] On November 8, 2008, Ms. Cruden filed her complaints with the Commission that CIDA and HC had discriminated against her in breach of the *CHRA*. The wording of the complaints against CIDA and HC were identical:

> I have been denied an assignment because of a disability that does not affect my job performance and that requires no accommodation, and no person or Agency has been willing to offer me any assistance in light of this issue.
>
> Note that this is now the third time in the some 27 years that I have been diabetic that I have had to face discrimination by the Government. As a result, I am charging that discrimination against diabetics is systemic in Canada and that the Human Rights Commission (HRC) should investigate the matter more broadly.

[24] The conduct complained of by Ms. Cruden was (1) that she was not being considered as an individual by the Afghanistan Guidelines, which created a blanket prohibition against type 1 diabetics; and (2) CIDA's refusal to re-post her to Afghanistan. As relief, Ms. Cruden sought a posting to Afghanistan, an apology from certain individuals in CIDA and HC, and a ruling about "what form of discrimination against diabetics is allowable." As for "accommodation," although Ms. Cruden complained that at that point she had been waiting six weeks for a response from HC regarding her list of nineteen countries, she noted immediately thereafter that she was "not looking for accommodation."

[25] On November 28, 2008, HC responded to Ms. Cruden concerning the possible nineteen countries she had provided. HC had found that five were considered suitable, five were considered unsuitable, and three were listed as missions with concerns which would require individual assessment. For the remaining six missions, it said that insufficient information had been received from the responsible regional medical officer and that an addendum would follow. It appears that neither HC or CIDA, or Ms. Cruden, followed up on the suitability of the remaining six countries.

[26] On January 16, 2009, HC-MAC rendered its recommendation that Ms. Cruden undergo a medical examination with an independent endocrinologist that would include a review of her history, clinical status, and detailed reports on medical conditions in Afghanistan. The HC-MAC further said that if the independent medical endocrinologist was of the opinion that a posting to Afghanistan would not put her or others at risk, that it would sign off on her case as meeting the medical requirements for this posting. However, if the independent endocrinologist was of the opinion that a posting to Afghanistan was medically inadvisable, HC's recommendation would stand. On February 15, 2009, Ms. Cruden informed HC that she would be willing to go through the medical exam recommended by HC-MAC towards "midsummer" 2009. In fact, she chose not to undergo that examination until September 22, 2009, when she was examined by Dr. Hugues Beauregard, an independent endocrinologist in Montreal. HC sent Dr. Beauregard Ms. Cruden's history and a description of the available medical facilities in Afghanistan, and identified the questions it wanted Dr. Beauregard to answer.

[27] In his report dated September 29, 2009, Dr. Beauregard noted that Ms. Cruden faced exposure to health risks slightly more elevated than non-diabetics even though she effectively

managed her condition of type 1 diabetes. He was of the opinion that she was fit for deployment to Afghanistan due to the fact that the health risks could be reduced to an "acceptable level" so long as she could bring the equipment she needed, and she was fit without restrictions to work at the Kandahar Air Field.

[28] On November 5, 2009, HC asked Dr. Beauregard to clarify the content of his report taking into account the Afghanistan Guidelines. In its original request to Dr. Beauregard it had stated: "We would ask that you take the document "Medical Evaluation Guidelines for Posting, Temporary Duty, or Travel to Afghanistan" into consideration when making your decisions, as we are required to use these guidelines when making our decisions."

[29] On November 19, 2009, Dr. Beauregard responded that the Afghanistan Guidelines would make Ms. Cruden unfit for deployment:

> Ms. Cruden is a type 1 diabetic and she needs insulin to stay alive. If she goes into hypoglycaemia, she absolutely needs carbohydrate immediately to recover, and if she is deprived of insulin, she will develop ketoacidosis, go into a coma and will die after a certain number of days (number that cannot be precisely determined, but probably represents a "short period of time").
>
> It appears clear, considering the content of this part of the document, that Ms. Cruden do [*sic*] not fulfil the medical requirements stated.

Dr. Beauregard remained of the view that Ms. Cruden could manage her diabetes in the prevailing conditions in order to bring any risk within "acceptable levels:"

> In my evaluation and recommendations, I focused on the fact that she had the willingness and the ability to prevent those two dramatic situations from occurring, but as in many situations, reaching a risk free environment is not possible even if she is not posted in Afghanistan. In my recommendation, I refer to the concept of

> "acceptable risk": By this I mean that she is able to face the degree of risk involved in Afghanistan and to manage her diabetes in the conditions prevailing in that country.

[30] CIDA also sought further clarification from Dr. Beauregard concerning implications for travel to remote areas. On November 24, 2009, Dr. Beauregard replied that the risk of Ms. Cruden travelling was acceptable, as long as she could have extra food and insulin to carry with her, but that he could not comment on the risks inherent to the political instability of the area.

[31] On December 16, 2009, HC informed CIDA that Dr. Beauregard concluded that Ms. Cruden did not meet the requirements of the Afghanistan Guidelines, but was nevertheless fit to work and travel in Afghanistan if she (i) has access to medication, testing equipment and backup supplies at all times; (ii) lives and sleeps in a room with a person aware of her condition; and (iii) has extra food and medication for travel. It concluded by saying that the final decision whether or not to post Ms. Cruden to Afghanistan was CIDA's.

[32] On September 24, 2009, Ms. Cruden had applied for three overseas postings for the 2010-2011 posting cycle: one in Afghanistan, one in Nepal, and one in Vietnam. On December 30, 2009, Ms. Cruden was advised that she was screened out of the Nepal competition because of her lack of experience, and from the Vietnam competition because she ranked "low relative to [the other twenty-three] candidates." On January 11, 2010, CIDA informed Ms. Cruden that in light of the information it received from HC, no further consideration would be given to posting her to Afghanistan, unless there was a change in her medical condition.

[33] Ms. Cruden's complaints against HC and CIDA were consolidated and heard by the Tribunal over twelve days in January 2011. It heard testimony from eleven witnesses. The Tribunal issued its decision and reasons on September 23, 2011: *Cruden v Canadian International Development Agency*, 2011 CHRT 13. The Tribunal divided its analysis into two parts: the complaint against HC and the complaint against CIDA. The decision concludes with various remedies ordered against both.

The Complaint Against HC

[34] The Tribunal concluded that Ms. Cruden had established a *prima facie* case that she "was adversely differentiated by HC's assessment process and guidelines on the grounds of her disability according to section 7(b) of the *CHRA*." The Tribunal's reasoning in this regard can be found at paragraph 72 of its reasons. In short, it found a *prima facie* case was established since the Afghanistan Guidelines provided that "no one with a chronic medical condition is allowed to be posted to Afghanistan;" Ms. Cruden has a chronic medical condition, type 1 diabetes mellitus; "diabetes is encompassed by the definition of disability in the CHRA;" and Ms. Cruden was prevented from being posted to Afghanistan because of the application of the Afghanistan Guidelines to her disability.

[35] The Tribunal reasoned that "[o]nce a *prima facie* case is established, the onus then shifts to the respondent to provide a reasonable explanation that demonstrates either that the conduct did not occur as alleged or was non-discriminatory." It found that HC had neither established that the conduct complained of did not occur as alleged or was non-discriminatory: see paragraphs 73 – 89 of the Tribunal's reasons. The Tribunal noted several procedural failings in the way HC dealt with

Ms. Cruden's case, including having raised her expectations and its delay. The Afghanistan Guidelines were found to be discriminatory because their wording and application had been "absolute" or "mandatory" and thus, reasoned the Tribunal, did not permit "individualized" assessments as is required by human rights law.

The Complaint Against CIDA

[36] The Tribunal also concluded that Ms. Cruden had established a *prima facie* case of discrimination against CIDA: "CIDA pursued a medical assessment practice, pursuant to HC's policies and guidelines, which deprived [Ms. Cruden] of an employment opportunity on a prohibited ground of discrimination: her disability. Therefore, a *prima facie* case of discrimination has been established under section 10(a) of the *CHRA*."

[37] It further found that she had "established that a distinction was made between her and her co-workers on the basis of her disability by the application of the Afghanistan Guidelines. This distinction was harmful to [Ms. Cruden's] career because she lost the opportunity to work and gain experience in Afghanistan," this was "adverse differentiation" under paragraph 7(b) of the *CHRA* and accordingly she had established a *prima facie* case of discrimination against CIDA under that paragraph. Accordingly, it fell to CIDA "to prove that these *prima facie* discriminatory practices were based on a *bona fide* occupational requirement" [BFOR].

[38] Section 15 of the *CHRA* provides that it is not a discriminatory practice "if any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to employment is based on" a BFOR, the burden of establishing which lies with the employer. For any such practice

to be based on a BFOR, it must be "established that the accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost."

[39] The Tribunal examined whether CIDA's refusal to post Ms. Cruden because of her medical condition was a BFOR using the tri-partite test articulated in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3, at para 54 [*Meiorin*]:

> 1. that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> 2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
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> 3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[40] The parties agreed that the first two elements of the *Meiorin* test were met. As to the third element, the Tribunal reasoned as follows:

> "[103] The analysis at this [third] stage looks at "…first, the procedure […] which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard" (*Meiorin* at para. 66). Therefore, I will examine, first, the procedure adopted by CIDA to assess the complainant's condition and possible accommodation and, second, whether accommodating the complainant in Afghanistan would cause CIDA undue hardship." [emphasis added]

[41] The Tribunal concluded that CIDA had not met its "procedural duty" to accommodate Ms. Cruden for many reasons, including the following:

- "CIDA did not respond to [Ms. Cruden's] initial request to exercise its discretion to allow her to go to Afghanistan;"

- "CIDA did not inform [Ms. Cruden] of, nor were the CIDA officials who testified familiar with, the procedures outlines in *FSD9* ["Foreign Service Directive 9 – Medical and Dental Examinations"], HC's medical assessment process or the *OHAG*;"

- "CIDA was actively implicated in the changes that were ultimately seen in the *Afghanistan Guidelines*;"

- "CIDA did not lead evidence that it explored all reasonable accommodation measures at the time of [Ms. Cruden's] request. Although CIDA discussed removing the travel requirements of her job [which it did], this did not address the complainant's need for operational field experience to advance her career. When [Ms. Cruden] asked for a list of countries to which she could be posted, it took CIDA over two months to determine that HC would take sufficient charge of this determination. It took another two months for HC to determine that insufficient information had been received with respect to six of the 19 countries, and that an addendum would follow once the information was received. HC never provided the addendum and CIDA did not make efforts to insure [*sic*] that an answer to this inquiry was provided;"

- "CIDA did not seek another independent medical opinion;"

- "CIDA did not attempt up to the point of undue hardship to ensure that the complainant would obtain her second or third choice for a posting overseas;" and

- "CIDA made attempts to accommodate [Ms. Cruden] but did not offer her any alternative other than applying for other postings and a position in the Afghanistan task force in Ottawa without travel requirements;"

[42] On the other hand, the Tribunal concluded that accommodating Ms. Cruden in a posting in Afghanistan would have caused CIDA "undue hardship:"

> [117] There is sufficient evidence before me to find that CIDA considered the possibility of implementing these conditions and arrived at the conclusion that it was

not possible. The evidence indicates significant health and safety risks for the complainant in working in Afghanistan, as well as safety risks for those fighting the war in Afghanistan should they have to assist the complainant. For the following reasons, I find that it would pose an undue hardship on CIDA to have to accommodate the complainant in Afghanistan.

[emphasis added]

[43] The numerous reasons cited by the Tribunal in support of this conclusion included:

- If she "needed evacuation," "[Ms. Cruden] would be in greater risk;"
- "[I]t was a challenge to have [Ms. Cruden] work inside the wire without any travelling requirement because that meant other employees had to travel more to compensate, which increased their exposure to the dangers in the area;"
- "[Ms. Cruden] would [be exposed] to increased stress, infections, and risks of injury that require more medical attention for a person with type 1 diabetes;"
- "Dr. Dupré ["an endocrinologist expert on behalf of the Respondents"] … did not see any possibility for accommodation. He wrote in his report concerning the risk of a severe hypoglycaemic event, that it was inevitable for [Ms. Cruden];"
- The credible evidence of a Colonel (surgeon) and Major in the Canadian Forces with operational experience in Afghanistan was that "the medical facilities in Afghanistan are limited and are operating at full capacity. […] and [a] commander may curtail military operations if he is made aware that a facility is [operating at or near full capacity] and would be unable to treat casualties;"
- "There are no Canadian medical facilities at the Canadian embassy in Kabul. Moreover, there is no ambulance or 911 services [*sic*]. In any emergency situation, a patient would require transportation by armoured car. The journey may also be delayed due to conflict. Afghan hospitals are considered too dangerous for western nationals;"
- "[I]f a person with type 1 diabetes gets shot there are additional risks to their health. Risks of being injured or shot, even in the PRT [Provincial Reconstruction Team compound], were said to be "real

> not slim" […] [and] civilian employees posted in Afghanistan are under constant threat of attack;"
>
> - "KAF gets shelled fairly regularly […] [and] during [a nine month period] there were 70 rocket attacks on the KAF. At the time of the hearing of this case, Major Thurlow testified that the KAF had recently suffered a rocket attack that landed in the dining facilities, injuring several people and killing one person;"
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> - "The PRT compound is also under threat of attack. […] "[F]irefights occur 300 to 400m away from the walls of the PRT, requiring employees to stay in bunkers". […] [I]n 2009, everyone at the PRT was evacuated because of a threat of a major attack;"
>
> - "The constant threat of attack also impacts on medical evacuations. Medical evacuations can be done either by armoured vehicle or by helicopter. Given the dangers of travelling by vehicle, most medical evacuations are done by helicopter. […] Each [helicopter] mission requires two helicopters to be flown […]. One helicopter will land while the other provides protection. According to Major Thurlow: […]"Interdiction is common – not unexpected. These helicopters are shot at – all helicopters are shot at. If they are flying around, they are shot at. It's a dangerous job";" and
>
> - "Major Thurlow added that Improvised Explosive Devices (IED) constitute another danger faced by soldiers performing medical evacuations. On one occasion, while making their way back to the helicopter after placing a casualty on a stretcher, two stretcher bearers became amputees when they stepped on an IED;

[44] The Tribunal continued with twenty additional, safety-related paragraphs on its way to concluding that accommodating Ms. Cruden in Afghanistan would have caused not only CIDA, but also Canadian Forces personnel "undue hardship" in the circumstances. Nevertheless, the Tribunal held that:

> CIDA has breached its procedural duty to explore all reasonable accommodation measures for [Ms. Cruden] and, as a result, a violation of sections 7 and 10 of the *CHRA* has been made out against CIDA. For its part, HC developed the *Afghanistan Guidelines*, which do not reflect equality between all members of

> society. In the course of employment, [Ms. Cruden] suffered adverse differentiation on the basis of her disability by the application of the *Afghanistan Guidelines*. On this basis, HC has violated section 7(b) of the *CHRA*. Therefore, both complaints are substantiated and the Tribunal will consider appropriate remedial action to eliminate these discriminatory practices.

Remedies

Overtime, Bonuses, etc.

[45] Ms. Cruden claimed considerable compensation for overtime, bonuses, and allowances that she says she would have earned had she been posted to Afghanistan. The Tribunal did not allow these expenses in light of its finding that posting Ms. Cruden to Afghanistan would have caused CIDA undue hardship.

[46] On the other hand, the Tribunal found that "were it not for the adverse differential treatment that [Ms. Cruden] received during the whole medical assessment and posting process," she "would have obtained a position in another country" and it was "reasonable to assume that she would have been at a PM-06 level." Although the Tribunal did "not have sufficient material before [it] to quantify [the amount she would have earned]," it decided to "remain seized of the matter" until the parties could make submissions as to the appropriate quantum.

Pain and Suffering

[47] Ms. Cruden claimed the maximum allowable amount for pain and suffering – $20,000. The Tribunal awarded her $5,000 from each respondent because "of the way [Ms. Cruden's] situation was handled by both respondents."

Wilful and Reckless Discrimination

[48] Ms. Cruden claimed the maximum allowable amount for wilful and reckless discrimination – $20,000. The Tribunal conceded that Ms. Cruden cited no case law nor made extensive submissions to support her claim; nevertheless it awarded Ms. Cruden $5,000 from each respondent because:

- "HC told [Ms. Cruden] they would accept the independent medical opinion whatever it may be. They were aware of what they said and modified their approach when the opinion was not what they expected;"
- "[HC] also worded the "Absolute Medical Requirements" and admitted at the hearing that it was a poor choice of words and could mislead someone doing an assessment;"
- HC did not try to correct the wording of the guidelines when they submitted the information to Dr. Beauregard, nor did they give him section one of the *OHAG*, which says that the guidelines are instructive not mandatory;"
- "HC knew what they were doing;"
- "On its part, CIDA refused to respond to [Ms. Cruden's] email requesting it to exercise its discretionary power to post her to Afghanistan;" and
- "CIDA cannot ignore the fact that no additional information was given to [Ms. Cruden] on other overseas postings."

Sick Leave Credits

[49] The Tribunal ordered the reinstatement of 55 days sick leave credit to reimburse Ms. Cruden for the sick leave she took in the summer of June 2009 because of the discrimination of which she complained.

Vacation Day Credits

[50] Ms. Cruden sought reinstatement of "vacation time credits totalling 15 days taken in order to prepare for and attend proceedings related to her complaint. Pursuant to paragraph 53(2)(c) of the *CHRA*, [the Tribunal] order[ed] the reinstatement of the 15 vacation day credits."

Appointment and Deployment

[51] Ms. Cruden was "seeking an appointment to a position at the EX-01 level within CIDA, pursuant to paragraph 53(2)(b) of the *CHRA* [and also] deployment to an operational position within CIDA's Geographic Programs Branch (GPB), pursuant to paragraph 53(2)(b) of the *CHRA* and requests to be posted to a family-friendly country of her choice."

[52] The Tribunal concluded that "if it were not for her disability she would have obtained a posting to Afghanistan or elsewhere because of her abilities to perform the duties required," and therefore it ordered that Ms. Cruden be deployed "in the GPB at the PM-06 level" and that CIDA "work with Ms. Cruden to post her in a friendly country within her top three choices where there are appropriate medical facilities and no medical restrictions that she will face."

Personnel File

[53] Ms. Cruden asked that any reprimand related to the pursuit of her claim be removed from her file. The Tribunal declined because the behaviour and comments she made about CIDA management which let to the reprimand were not "done within appropriate boundaries."

Legal Fees

[54] Ms. Cruden sought compensation for legal fees in the amount of $2,712.68. Citing *Canada (Attorney General) v Mowat*, 2009 FCA 309, wherein the Federal Court of Appeal held that the Tribunal did not have the authority to make an award of costs under the provisions of the *CHRA*, the Tribunal declined to award legal costs.

Systemic Remedies

[55] The Tribunal reasoned that the *Afghanistan Guidelines* "must be clarified to ensure that their interpretation does not lead doctors in excluding every person with a chronic condition. […] [and that] [t]he wording of the "Absolute medical requirements" should be changed to reflect a high medical standard for posting to Afghanistan, while not instituting a complete ban." Accordingly, the Tribunal ordered:

> (a) That HC amend the *OHAG* to remove any references in the *Afghanistan Guidelines* to "Absolute medical requirements", and instead adopt an approach that simply lists factors that are to be considered as part of an overall individualized assessment, with an express recognition that no single factor will necessarily be determinative;
>
> (b) That HC amend its policies, or create a new policy, requiring that in cases where a treating specialist physician provides an opinion on employee fitness that differs from the initial opinion of the OHMO, and HC does not agree with the specialist, HC will:
>
> (i) consult with the treating specialist to explore the bases for the different opinions;
>
> (ii) if still not in agreement, promptly offer to send the employee for an independent medical examination by a specialist in the appropriate field;
>
> (iii) if dissatisfied with the independent specialist, consult with the independent specialist to explore the bases for the different opinions; and

(iv) ultimately, if no resolution has been reached, place before the employing department full, objective and impartial descriptions of all the recommendations as to fitness rendered by the various physicians who were consulted during the process;

(c) That HC and CIDA amend their policies, or create a new policy, to clearly state that the *CHRA* and the "duty to accommodate to the point of undue hardship" must be considered and applied whenever recommendations or decisions are being made with respect to the medical fitness of civilian employees for postings, regardless of where those postings might be;

(d) That CIDA amend its policies, or create a new policy, so as to put a mechanism in place to ensure that all employees who apply for postings (and for temporary duty assignments, in the case of Afghanistan) are first made aware:

(i) that all successful candidates will be required to undergo a pre-deployment medical assessment by HC, or by another provider if CIDA deems appropriate;

(ii) that if they receive a negative assessment, they will have the right under *FSD9* to submit a written opinion from a treating physician to HC which will then provide a reassessment to CIDA, possibly after offering the employee an opportunity to undergo an independent medical examination;

(iii) that if HC does not request an independent medical opinion, CIDA may itself offer the employee an opportunity to undergo an independent medical examination, the results of which will be provided to HC for further assessment; and

(iv) ultimately, the final decision about whether to put a candidate forward for head of mission concurrence lies with CIDA, and not with HC or any other department.

(e) That HC provide training to all managers and OHMOs involved in conducting pre-deployment medical assessments on:

(i) The application of the *FSD9* to their work; and

(ii) The application of the *CHRA* to their work, including insofar as it relates to legal principles relating to the assessment of health and safety risks as a possible form of undue hardship;

(f) That CIDA provide training to all managers and staff involved in making decisions about postings and temporary duty assignments on:

(i) The application of the *FSD9* to their work; and

(ii) The application of the *CHRA* to their work, including insofar as it relates to the assessment of health and safety risks as a possible form of undue hardship."

The steps outlined in paragraph (a) to (f) were to be completed within one year of the decision. The Tribunal remained seized until the parties confirmed that the terms of its order, or further orders, had been implemented.

[56] Although not part of the application before the Court, it is noted that clarification was requested with regards to the implementation of the order that CIDA deploy Ms. Cruden to a post in a friendly country within her top three choices. That clarification was rendered by decision dated March 1, 2012. It does not impact the issues before the Court.

Issues

[57] CIDA and HC identified the following eight issues in their memorandum:

i) What is the applicable standard of review?

ii) Was it reasonable for the Tribunal to find a breach of the *CHRA* on the basis of a failure to comply with a "procedural duty" to accommodate?

iii) Was it reasonable for the Tribunal to find that the *Afghanistan Guidelines* were discriminatorily applied to the Respondent?

iv) Was it reasonable to order that the complainant be deployed to a PM-6 position in the Geographic Programs Branch within CIDA and be posted to a country of her choice?

v) Was it reasonable to order prescriptive remedies against Health Canada and CIDA as to how it must conduct health assessments, interact with external physicians and communicate with its employees?

vi) Was it reasonable to order that the Applicant establish written policies "satisfactory to" the complainant and the Commission?

vii) Was there any evidentiary basis upon which the Tribunal could order the payment of damages for "wilful and reckless" discrimination?

viii) Was it reasonable to order crediting of vacation credits for the preparation of the hearing?

[58] In my view, the many issues raised by the parties may appropriately be considered under the following four questions:

1. What is the appropriate standard of review of the Tribunal's decision?
2. Did the Tribunal err in finding that there had been a failure to accommodate under the *CHRA* on procedural grounds in light of its prior finding that substantive accommodation of Ms. Cruden was not possible without undue hardship?
3. Was the Tribunal's finding that the application of the Afghanistan Guidelines to Ms. Cruden by HC was discriminatory contradicted by its own finding that she could not be accommodated without undue hardship?
4. Was there a proper legal or evidentiary basis for the remedies ordered?

1. Standard of Review

[59] The parties are in agreement that the standard of review of the Tribunal's decision is reasonableness. The applicants submit that there is only one reasonable interpretation of the duty to accommodate as found in the *CHRA* while the respondents take the position that whether there is one or more than one interpretation, the interpretation rendered by the Tribunal is reasonable and ought not be disturbed.

[60] In *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 [*Mowat*], which dealt with whether the Tribunal has jurisdiction to make an order of costs, the Supreme Court held that the Tribunal was generally entitled to deference respecting the interpretation of its home statute or the legal rules closely connected thereto. The Tribunal's decision, based on its interpretation of the *CHRA*, was that it had jurisdiction to award costs. The Supreme Court found otherwise, and held at paragraph 64 of its reasons that "the text, context and purpose of the legislation clearly shows that there is no authority in the Tribunal to award legal costs and there is no other reasonable interpretation of the relevant provisions."

[61] In this case, CIDA and HC submit that there is no reasonable interpretation that supports the Tribunal's conclusion that the *CHRA* creates both procedural and substantive rights and duties to accommodate such that one may be found in breach of the procedural duty even if found not to have breached the substantive duty. Accordingly, they say that while the standard of review is reasonableness, there is only one reasonable interpretation available and it is not made by the Tribunal.

2. Procedural and Substantive Duties to Accommodate

[62] In the decision under review, in holding that there are both procedural and substantive duties to accommodate, each of which may be breached independently of the other, the Tribunal was either engaged in (i) an interpretation of the wording of the relevant sections of the *CHRA*, or (ii) applying the decision of the Supreme Court in *Meiorin* to the facts before it. Regardless of which of these approaches was employed, I find that the Tribunal's decision was unreasonable and must be set aside.

Statutory Interpretation of the CHRA

[63] An understanding of the scheme of the *CHRA* is required in order to properly understand the duty to accommodate. The scheme of the *CHRA* relevant to this application is as follows:

> (a) It is "discriminatory practices" that are prohibited by the *CHRA*. It is a discriminatory practice "in the course of employment, to differentiate adversely in relation to an employee" because of disability: *CHRA* paragraph 7(b). It is also a discriminatory practice to "establish or pursue a policy or practice … that deprives or tends to deprive an individual or class of individuals of any employment opportunities" because of disability: *CHRA* paragraph 10(a).
>
> (b) But, it is not a discriminatory practice if the adverse differentiation, deprivation, or limitation, etc., is established by the employer to be based on a BFOR: *CHRA* paragraph 15(1)(a).
>
> (c) For a discriminatory practice to be based on a BFOR "it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would be accommodating those needs, considering health, safety and costs:" *CHRA* subsection 15(2).

(d) An individual or group of individuals who, on reasonable grounds, believe that a person "is engaging or has engaged in a discriminatory practice may file with the Commission a complaint:" *CHRA* subsection 40(1).

(e) If the complaint of a discriminatory practice is not substantiated, "the member or panel conducting the inquiry shall dismiss the complaint" [emphasis added]: *CHRA* subsection 53(1). If the complaint of a discriminatory practice is substantiated, the member or panel may make an order against the person found to be engaging or to have engaged in the discriminatory practice: *CHRA* subsection 53(2).

[64] What is evident from the foregoing is the criticality of a finding of a discriminatory practice. It is an allegation of a discriminatory practice which grounds the complaint and it is the finding of a discriminatory practice that provides the Tribunal with jurisdiction to order remedial action. Moreover, and of particular relevance to this application, a BFOR finding negates, and is a complete defence to, any allegation of a discriminatory practice. In short, and in the context of this case, if CIDA establishes that it cannot accommodate Ms. Cruden's disability in Afghanistan without undue hardship, then there is no discriminatory practice and no violation of the *CHRA*.

[65] In this case, HC did not recommend Ms. Cruden for posting in Afghanistan; CIDA agreed, and did not post her to Afghanistan. The Tribunal found that if it was not for its refusal to post Ms. Cruden to Afghanistan, CIDA would have experienced undue hardship because there were myriad pitfalls in posting a Type 1 diabetic with her profile and medical needs into a war zone. The finding of undue hardship is not contested by Ms. Cruden or the Commission.

[66] Nevertheless, despite its finding that it would have caused CIDA undue hardship to post Ms. Cruden to Afghanistan, the Tribunal found that CIDA and HC violated a separate procedural duty it understood to be owed in the accommodation process. In particular, as discussed above, Ms. Cruden's expectations were raised, emails were not responded to promptly, and "CIDA did not … [explore] all reasonable accommodation measures at the time of [Ms. Cruden's] request."

[67] If the Tribunal was interpreting the *CHRA* when it found that there is a procedural duty of accommodation that can be breached notwithstanding that accommodation is impossible without undue hardship, then that interpretation is plainly unreasonable. The provisions of the *CHRA*, as discussed previously, are clear and unambiguous: If a person cannot be accommodated without undue hardship then the alleged discriminatory practice is based on a BFOR; if it is based on a BFOR then it is not a discriminatory practice; and if it is not a discriminatory practice the Tribunal "shall" dismiss the compliant. In my view, there is no reasonable interpretation of the *CHRA* that permits the Tribunal to continue to examine a complaint and the actions of the parties once it has found, as it did in this case, that accommodation is not possible without undue hardship.

Meiorin

[68] If the source of this alleged procedural duty to accommodate does not lie in the *CHRA*, it might be thought that its source is the decision of the Supreme Court of Canada in *Meiorin*, which is referenced by the Tribunal in the following paragraphs of its decision:

> [101] The third step of the *Meiorin* analysis examines "...whether the standard is required to accomplish a legitimate purpose, and whether the employer can accommodate the complainant without suffering undue hardship" (*Kelly* at para. 356; see also *McGill*

> *University Health Centre* at para. 14). The use of the term "undue" infers that some hardship is acceptable. It is only "undue hardship" that satisfies this test (see *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, at page 984.). Generally, undue hardship means "disproportionate, improper, inordinate, excessive or oppressive" and is "...reached when reasonable measures of accommodation are exhausted and only unreasonable or impracticable options for accommodation remain" (*Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007 SCC 15 at paras. 130, 140). The complainant must facilitate the search for meaningful accommodation by responding to reasonable employer requests for relevant medical information regarding his or her limitations, in order to allow the employer to initiate a proposal (*Tweten v. RTL Robinson Enterprises Ltd.*, 2005 CHRT 8; and, *Graham v. Canada Post Corporation*, 2007 CHRT 40) However, an employee cannot dictate to an employer the precise terms of an accommodation and cannot expect a perfect solution (see *McGill University Health Centre*; and, *Hutchinson v. Canada (Minister of the Environment)*, 2003 FCA 133).
>
> [102] It may be ideal for an employer to adopt a practice or standard that is uncompromisingly stringent, but if it is to be justified it must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship (*Meiorin* at para. 62.). Furthermore, when an employer is assessing whether it can accommodate an employee it must do an individualized assessment of the employee's situation. In this regard, in *McGill University Health Centre*, the Supreme Court of Canada stated: "The importance of the individualized nature of the accommodation process cannot be minimized".
>
> [103] The analysis at this stage looks at "...first, the procedure [...] which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard" (*Meiorin* at para. 66). Therefore, I will examine, first, the procedure adopted by CIDA to assess the complainant's condition and possible accommodation and, second, whether accommodating the complainant in Afghanistan would cause CIDA undue hardship.

[69] In my view, *Meorin* simply does not reasonably support the proposition that there exists a separate, procedural duty in the accommodation process which can be breached notwithstanding a

substantive finding of undue hardship and which would attract remedies on its own. In paragraph 66 of *Meiorin*, which is the passage referenced by the Tribunal, the Supreme Court is merely stating that a court or tribunal can look at the procedure employed in the accommodation process as a practical tool for deciding whether an employer has established – on an evidentiary basis – undue hardship:

> Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard: see generally Lepofsky, supra [emphasis added].

[70] That is not to say that the procedure used by the employer when considering accommodation cannot have significance in any given case; indeed, in practical terms, if an employer has not engaged in any accommodation analysis or attempts at accommodation at the time a request by an employee is made, it is likely to be very difficult to satisfy a tribunal on an evidentiary level that it could not have accommodated that employee short of undue hardship: See, e.g., *Koeppel v Canada (Department of National Defence)*, 97 CLLC 230-024, 32 CHRR D/107 at paras 212 – 228 (CHRT). That is the very real and practical effect of the evidentiary burden to establish a BFOR resting with the employer.

[71] Madam Justice Gray of the Supreme Court of British Columbia, in a judgment rendered after the decision under review, recognized this distinction. She stated in *Emergency Health Services Commission v Cassidy*, 2011 BCSC 1003 at paras 33 and 34:

> Tribunal Member Lyster relied on *Meiorin* as authority for the proposition that an employer has both a procedural and substantive

> "duty" to accommodate a disabled employee to the point of undue hardship. However, in *Meiorin*, the Supreme Court of Canada did not consider whether the employer had treated Ms. Meiorin "fairly, and with due respect for her dignity, throughout the accommodation process". The focus of the analysis was whether the Aerobic Standard was appropriate. McLachlin J. considered that standard both "procedurally", relating to how the Aerobic Standard was set, and "substantively", relating to whether the employee could be accommodated without undue hardship to the employer. The distinction between a procedural analysis and a substantive analysis was an analytical tool for determining whether the Aerobic Standard was a BFOR, and whether the claimant had been accommodated to the point of undue hardship.
>
> While McLachlin J. wrote that it may often be useful to consider any procedure adopted in assessing accommodation, she did not write that such an analytical tool created a separate duty that can be breached. The single question remains of whether the employer could accommodate the employee without experiencing undue hardship. [emphasis added]

[72] I agree. The evidentiary significance of the procedure used by the employer is, in my view, what the Supreme Court meant in *Meiorin* when it said that "it may often be useful as a practical matter to consider … the procedure, if any, which was adopted."

[73] Moreover, the plain words of paragraph 66 of *Meiorin* - "the procedure, if any, which was adopted" [emphasis added] - supports the opposite conclusion to that reached by the Tribunal, because it contains an acknowledgement that an employer may not have engaged in any accommodation analysis and yet may still be able to establish undue hardship. It is clear that one can not be said to have met a procedural duty to accommodate when one has not engaged in any procedure at all.

[74] The Respondents rely on the decision of the Ontario Divisional Court in *ADGA Group Consultants Inc. v Lane* (2008), 91 OR (3d) 649 (Div Ct) [AGDA] wherein it was found that the decision of the Ontario Human Rights Tribunal that the employer there had failed both the procedural and substantive duties to accommodate was reasonable. That case is distinguishable because the finding of the tribunal in that case was that the employer had discriminated against Mr. Lane by firing him from his employment without establishing that it could not accommodate his disability without undue hardship. Here the Tribunal found that CIDA and HC had established that accommodation was not possible without undue hardship.

[75] To a large extent the tribunal and court in AGDA examined the "procedures" used by the employer as evidence as to whether substantive accommodation was possible without undue hardship. In that case the employer did very little to either determine what the essential aspects of the job were, whether Mr. Lane could perform them, and if not what possible accommodation would be required. The tribunal found that the there was a "rush to judgment" by the employer and it had failed to prove that it could not accommodate Mr. Lane without undue hardship. To the extent that the court's decision suggests that there is a separate procedural duty of accommodation which can be breached even if the substantive duty has not, I respectfully disagree.

[76] As previously noted, the present case is exceptional since the Tribunal was satisfied that it would have caused CIDA undue hardship *despite* finding that CIDA did not engage in a sufficiently robust accommodation analysis. Nevertheless, there is but one duty: the duty to accommodate an employee to the point of undue hardship. The finding that it would have caused CIDA undue

hardship to accommodate Ms. Cruden in Afghanistan should have ended the Tribunal's inquiry as the effect of that finding was that there was no discriminatory practice.

3. The Afghanistan Guidelines

[77] As mentioned above, the contentious provision in the Afghanistan Guidelines reads as follows under the heading "Absolute medical requirements:"

> Employees do not meet the medical requirements for assignment or posting: […] If they have a medical condition that would likely lead to a life-threatening medical emergency if access to prescribed medication and/or other treatment is interrupted for a short period of time.

[78] The Tribunal found that HC violated paragraph 7(b) of *CHRA* which makes it a discriminatory practice "in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination." As the Tribunal put it at paragraph 89 of its decision: "The application of these guidelines to the complainant resulted in her being discriminated against in the course of her medical assessment" [emphasis added]. This statement as well as others in the decision which are set out below, makes it clear that the finding relating to these guidelines was to the process HC used, not the result to which the guidelines pointed (indeed, having found that Ms. Cruden could not be posted to Afghanistan without undue hardship – effectively the same result as the guidelines directed, that she was not medically fit to be posted to Afghanistan – such a finding would have been contradictory):

- "The complainant claims that the guideline and medical assessment process adversely differentiated against her on the basis of her disability, a prohibited ground of discrimination" [emphais added].

- "I find that there is a problem with the manner in which the "Absolute medical requirements" of the Afghanistan guidelines, are worded and therefore are open to more than one interpretation."
- "Throughout the whole process the complainant's dignity was not preserved…"
- "The intention of a guideline or policy may be legitimate, but the manner in which it is expressed or applied may be deficient."

[79] For the reasons set out above, there is no independent and separate discriminatory practice as set out in the *CHRA* that rests only on the accommodation process or the manner in which a policy or guideline is applied in the accommodation process, unless of course the process itself or the application of the policy or guideline is conducted in a substantively discriminatory manner. But there is no such allegation here. In other words, there is no allegation that, for example, HC's delay in responding to emails or raising Ms. Cruden's hopes had anything to do with her disability or was, in other words, based on that prohibited ground of discrimination. Absent a finding that there was such a substantive discriminatory practice, this complaint against HC had to be dismissed. In short, it simply cannot be that HC's "adverse differentiation" of Ms. Cruden – that is to say its recommendation that she not be posted to Afghanistan because of her diabetes (see paragraph 72 of the Tribunal's reasons) – is not vindicated and completely rectified by the finding of undue hardship in relation to her employer, CIDA. Any other result defies logic and common sense.

[80] This is not to say that there may not be a situation in the future where the application of the Afghanistan Guidelines would result in an employee being prevented from a posting in Afghanistan even though that employee's disability could be accommodated without undue hardship, but this is

not that case. Moreover, the Tribunal did not even identify *any* potential situation where an employee may be disentitled to a posting to Afghanistan by the application of the Afghanistan Guidelines but could still be accommodated in such a posting short of undue hardship to his or her employer. Unless one concrete example or at least general possibility is identified, it is baseless to assert, in the broadest sense, that the guidelines "differentiate adversely in relation to an employee," which is the requirement in paragraph 7(b) of the *CHRA*, or "[deprive] or [tend] to deprive an individual or class of individuals," which is the requirement in paragraph 10(a).

[81] HC acknowledged at the hearing before the Tribunal that the "absolute medical requirements" heading of the Afghanistan Guidelines was unfortunate as it did not capture the intention that it was a "guideline" and the Court was given to understand at the hearing of this application that it was under revision to reflect that fact. Any issue of compliance of the revised guideline with the *CHRA* will be addressed in the context of a specific fact situation that may arise in the future, i.e. where an employee claims they could be accommodated in an Afghanistan posting but is denied that opportunity through the application of the revised guideline.

[82] In summary, absent a finding of a discriminatory practice, Ms. Cruden's complaint had to be dismissed. It may be, as the Tribunal found, that the wording of the Afghanistan Guidelines requires revision; however, absent a finding of a discriminatory practice in the result achieved when the guidelines are applied to Ms. Cruden or some other reasonably identifiable future individual or class of individuals, the Tribunal had no jurisdiction to order the remedies it did. The application of the Afghanistan Guidelines did not discriminate against Ms. Cruden as she could not be

accommodated in a posting to Afghanistan without undue hardship, there was no discriminatory practice as a result, and the complaint ought to have been dismissed.

4. Remedies Awarded

[83] The *CHRA* does not impose on employers a broad duty to manage and promote the careers of those who are prevented from holding certain positions, or enjoying certain benefits, for entirely justifiable, legitimate, and defensible reasons, simply because they possess a certain characteristic. Rather, the focus of the *CHRA* is on the negative – it is on the limitation or the refusal, and the removal of those limitations and refusals that unjustifiably limit individuals possessing certain characteristics. Here, the limitation was contained in the Afghanistan Guidelines and the refusal was CIDA's refusal to post Ms. Cruden to Afghanistan. As discussed at length above, the *CHRA* is clear in stating that if the limitation or refusal was based on a BFOR, there is no discriminatory practice. The Tribunal found that without the refusal in this case, CIDA would have experienced undue hardship. That means CIDA's refusal was a BFOR. Accordingly, the Tribunal had no authority to award any remedy. CIDA was under no duty under the provisions of the *CHRA* to manage Ms. Cruden's career to ensure she received posting experience. Its duty was to impose only those restrictions, and make only those refusals that were justifiable as a BFOR. This it did and the remedies ordered against CIDA were made without jurisdiction.

[84] Similarly, because of its finding that Ms. Cruden could not be accommodated without undue hardship there was no basis for the finding that the Afghanistan Guidelines or HC discriminated against Ms. Cruden. Accordingly, the remedies ordered against HC were also made without jurisdiction.

[85] The decision of the Tribunal is set aside in its entirety. In the ordinary course when a decision is set aside on judicial review, it is referred back to the tribunal to make a proper decision; however, that is not an appropriate result in this case. The Tribunal found that CIDA had established at the hearing that Ms. Cruden could not be accommodated without undue hardship. As noted above, that finding was not challenged by either the Commission or Ms. Cruden. In light of that finding, there was no discriminatory practice and thus there can be no violation of the *CHRA*, as was alleged in the complaint. Accordingly, there is only one possible finding available to the Tribunal, to dismiss the complaint. Given that, no useful purpose is served by referring the complaint back to the Tribunal for a rehearing. Remedies on judicial review are discretionary and in the exercise of my discretion, given those facts, I find that it is appropriate to quash the decision in its entirety and not refer the complaint back to the Tribunal.

[86] The Attorney General is entitled to costs. If the parties are unable to agree on quantum, they may file written submissions, not exceeding five pages in length, within 15 days of this judgment.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed, the decision of the Canadian Human Rights Tribunal dated September 23, 2011 is set aside, and the Attorney General is entitled to costs.

"Russel W. Zinn"
Judge

Appendix A

Canadian Human Rights Act, RSC 1985, c H-6
Loi canadienne sur les droits de la personne, LRC 1985, ch H-6

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

…

7. It is a discriminatory practice, directly or indirectly,

2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.

…

7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

…

10. It is a discriminatory practice for an employer, employee organization or employer organization

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of

a) de refuser d'employer ou de continuer d'employer un individu;

b) de le défavoriser en cours d'emploi.

…

10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :

a) de fixer ou d'appliquer des lignes de conduite;

b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

discrimination.

…

15. (1) It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

…

15. (2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

…

15. (1) Ne constituent pas des actes discriminatoires :

a) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;

…

15. (2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

FEDERAL COURT

SOLICITORS OF RECORD

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